IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-863

MARK FREDERICK BUTHORN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUBJECT INDEX

LIST OF AUTHORITIES

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Petitioner, MARK FREDERICK BUTHORN, JR., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on November 18, 1977.

JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on November 18, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

The Appellant was originally convicted on February 2, 1977 in the Southern District of New York, Judge Charles L. Brieant presiding. The Second Circuit Court of Appeals affirmed that conviction by oral opinion delivered from the bench on August 18, 1977. A motion for Rehearing En Banc was denied on November 15, 1977.

CITATIONS TO OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals apparently will not be reported.[1]

QUESTIONS PRESENTED

(1) May a prior act of alleged misconduct, for which there has been no criminal charge or conviction, be introduced by the prosecution for *any* purpose in a case where proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident are not in issue?

(2) Did the trial judge deprive the Appellant of a fair and impartial trial by jury and the assistance of competent counsel by his unrelenting attacks on defense counsel?

RULES INVOLVED

The following Federal Rules of Evidence are involved:

Rule 403 states: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue,

1. The written opinion will be supplied to this Court if it is available.

or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404(b) states: Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he act in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Rule 608(b) states: Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609 may not be proved by extrinsic evidence. They may, however, in the discretion of the Court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness . . .

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

PRELIMINARY STATEMENT

Mark Frederick Buthorn, Jr. was charged in a twenty-six (26) count indictment with making false statements to the Department of Health, Education and Welfare in connection with claims for Medicaid services in violation of Title 18, United States Code, Section 1001.[2] Prior

2. His indictment had originally consisted of fifty-six (56) counts —twenty-eight (28) charging false claims and twenty-eight (28) charging false statements. At an earlier trial held in July, 1976 before the Honorable Marvin E. Frankel, the Government elected

to submission to the jury, four (4) additional counts were dismissed. Accordingly, twenty-two (22) counts went to the jury and Appelant was convicted of all of them.

On March 16, 1977, Judge Brieant sentenced Appellant to four (4) years imprisonment on each of the twenty-two (22) counts, to run concurrently with each other.

STATEMENT OF FACTS

As is typical in H.E.W. false claims cases, the Appellant, a podiatrist, was accused of preparing invoices submitted for payment under the Medicaid program, for services he did not perform. Those claims were the basis of al twenty-two (22) counts of the indictment.

Some of the Government's witnesses testified they had not received the treatment Dr. Buthorn claimed to have administered to them.

The only significant difference between the first trial, which ended in an acquittal on two (2) counts and a hung jury and the trial in which Dr. Buthorn was convicted was as follows:

> During the first trial evidence of a previous, unrelated dispute between the Appellant and Medicare, which was resolved by the payment of eight thousand dollars ($8,000.00) by the Appellant to Medicare, was specifically excluded from the evidence.

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to proceed on the false statement counts and the false claim counts were dismissed. The jury hung on twenty-six (26) counts after acquitting the Appellant on two (2) counts and a mistrial was declared. The case was reassigned to Judge Brieant for re-trial on the remaining counts.

REASONS FOR GRANTING THE WRIT

I.

During the course of his second trial the Appellant took the stand and testified that he had performed every service he had claimed for each of the patients who had testified. Appellant then introduced into evidence pink carbon copies of his original invoices, previously submitted by the Government (GX 1-28) and alleged to be false, along with the "day book" of the clinic at which he worked and some patients' charts on which entries were made contemporaneously with the making of the invoices, all in corroboration of his testimony. (Tr. 698-848). Appellant then testified that for the first few months he worked at the clinic in question (during 1971) he kept his own records on each of his patients on certain index cards, which he destroyed several years later (during 1975) because he did not need them anymore. (Tr. 862-863)

The prosecutor then asked a question which ultimately convicted the Appellant—even though it involved subject matter the prosecutor was not allowed to go into during the first trial:

> "Dr. Buthorn, it is a fact, is it not, that you had some difficulties in documenting some of your treatment on some of your other Medicare patients? Is that correct? (Tr. 863)

Before his lawyer objected the Appellant answered "No." (Tr. 864)

At a minimum the very asking of the question violated The Code Of Professional Responsibility Of The American Bar Association:

"In appearing in his professional capacity before a tribunal, a lawyer shall not:

. . .

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person . . ."

After vigorous objection by defense counsel Judge Brieant precluded further inquiry into the question of the Appellant's dispute with Medicare and Blue Cross, ostensibly because the Appellant had answered "no" and the prosecutor "must take his answer." McCormick, Evidence 2d Ed., Page 84. But the prosecutor persisted, stating he would:

> . . . like to develop the line that he [Appellant] had a great deal of trouble in the summer of '72 and '73 with Medicare in documenting certain treatments he had claimed for, and that trouble resulted in him paying back Medicare eight thousand dollars. We are not suggesting that this dispute was any criminal activity on the part of Dr. Buthorn. Medicare had a difference of opinion with Dr. Buthorn concerning whether or not the treatments he was giving were treatments covered by Medicare." (Tr. 864-5)

The judge's response was correct:

> THE COURT: Why wouldn't it be criminal? You see the difficulty—" (Tr. 865)

The prosecutor persisted:

> MR. WILSON: I will give him [Appellant] the benefit of the doubt.

> Let me explain, your Honor. He had a great deal of trouble with Medicare to the extent of paying back eight thousand dolars. *Now after being burned for eight thousand dollars in 1973, destroying records in 1975 would be the last thing a reasonable man would do, and this goes directly to his credibility.* (emphasis added)
>
> THE COURT: The difficulty with it is that it implies to the jury that he committed a prior crime which was similar to this one, and I don't know how you can —
>
> MR. WILSON: To ask a witness—
>
> THE COURT: Please, Mr. Wilson, let me finish. It is highly prejudicial and not very probative of anything.
>
> You see, this is an unusual case. He has not testified he made a mistake or that he had careless records or that his secretary filled out the records wrong and it was billed by inadvertance or negligence or something like that. This man has flatly testified under oath before me in this trial that every one of these treatments for which he billed had been rendered. Maybe you didn't hear it. (Tr. 865)

Judge Brieant then emphasized at least four more times that the probative value of such evidence was overwhelmed by the implication that Appellant's civil settlement was a criminal act. (Tr. 866, 867, 869, 871) However, after redirect of Appellant, the entirety of which is set out herein, the judge changed his decision completely.

REDIRECT EXAMINATION

By Mr. Grunewald:

Q. Dr. Buthorn, can you tell us the difference between in-patient and out-patient?

A. Yes. It's a term that refers to a patient—to patients who are residing in a facility, such as a nursing home or hospital. That is termed an in-patient.

People who are taken care of almost anywhere else, whether it be in a physician's office or in fact a clinic at the hospital, these are termed out-patients.

An out-patient comes, receives care from a physician and leaves.

Q. Now, in connection with in-patient treatment, a hospital facility or something of that nature, are there generally nurses?

A. Yes, there are.

Q. In the case of out-patient facilities, and in particular, let's go to the clinic in 1971, the Centro Medico Clinic, did you have any nurses there?

A. No, I didn't.

Q. Was that in-patient or out-patient type of treatment?

A. That is an out-patient kind of treatment.

Q. With respect to the keeping of records, are there any directives from Medicaid with respect to how you must keep records and for how long a period of time, or anything of that nature?

A. No, there is no obligation at all.

Q. Since you were asked the questions with respect to Medicare, is there the same rule or what?

A. There are no directives. In fact, if you make a request from Medicare as to receive directives as to what they want, they will simply say that it is illegal for Medicare to give out directives as to the administrative care of individuals.

Q. With respect to the card records that you initially kept for a few months in 1971, was there anything on those card records that would be substantially different than what was on the invoices themselves?

A. No, there would not be.

Q. When in or about 1975—you told us you were clearing out your office and some things were thrown out.

Was that the only thing that was thrown out at the time?

A. No, there were a great deal of things thrown out of the office.

Q. The card records, for what period of time were these, as best you can recall?

A. The card records were the beginning of 1971.

Q. Did you keep anything which reflected the same information that was on those few card records?

A. Yes, I did. I kept the pink sheets of my invoices filed with New York State.

Q. At the time that you cleaned out your office, at that time were you indicted or even accused of the charges in this indictment?

A. No, I was not. (Tr. 934-6).

Over timely objection of defense counsel (Tr. 937) the prosecutor was allowed to develop the hitherto condemned evidence. The theory of the Court was: (1) that redirect had opened the door (Tr. 937); (2) that the evidence, only moments before indicative of a criminal act, was now merely civil in nature (Tr. 942); and (3) an almost incomprehensible statement by the Court that "This particular line of inquiry is being permitted for a very limited purpose only, and that is to assist the jurors in considering the credibility of this witness as to his testimony that he threw out or destroyed cards or records in the HIN Clinic for services rendered in 1971. That is all." (Tr. 945) The prosecutor's inquiry demonstrated that Appellant had been, in effect, reprimanded by Blue Cross for not keeping proper records, and as a result in 1973 had been assessed $8,000. (Tr. 936-49)

The effect of allowing the prosecutor to profit by his own unethical questioning—upon such flimsy justification as was offered by the Court—resulted in prejudicial hearsay evidence of an alleged civil settlement attaining the level of substantive evidence—which while arguably relevant, only served to inflame the jury by creating the impression that Appellant had a criminal character and predisposition to commit the crimes alleged. This type of conviction by character assassination—impeachment by prior acts of alleged misconduct where no exception allows its introduction—has been condemned by all jurisdictions. McCormick, *Evidence*, 2nd Ed., Pages 81-84. Such questioning and the testimony it might elicit is specifically precluded by Federal Rules of Evidence 404 (b) and 609(b) as well as Rule 403, which excludes even relevant evidence on grounds of substantial prejudice.

Finally defense counsel had no choice but to ask questions designed to explain the unfair impression created by the prosecutor's inquiry that the Appellant had committed a similar crime before. Defense counsel was obligated to proceed and justified by the "rule of completeness", which permits proof of the remainder of a transaction, conversation or writing when only a part thereof has been proven by his adversary—as was the case herein. Defense counsel did not open the door to every and all kind of recross-examination, as Judge Brieant seemed to indicate; the "open the gate" theory simply will not permit eliciting incompetent and prejudicial evidence on re-examination. *Barrett v. United States*, 82 F.2d 528 (7th Cir. 1936); *United States v. Maggio*, 126 F.2d 155 (3d Cir. 1942); *Chamberlain v. State*, 348 P.2d 280 (Wyo. 1960); See also, *People v. Arends*, 155 Cal. App. 2d 496, 318 P.2d 532 (1958).

II.

During the course of the trial the District Judge repeatedly hurried, belittled and badgered defense counsel, both in the presence of the jury and at the bar.[3] Judge Brieant's impatience and intemperance created an atmosphere that denied Appellant a fair trial and due process of law and the conviction must be reversed. *United States v. Coke*, 339 F.2d 183, 185 (2d Cir. 1964); *Young v. United States*, 346 F.2d 793 (D.C. Cir. 1965); *Sunderland v. United States*, 19 F.2d 202 (8th Cir. 1927).

The cross-examination of every important government witness was punctuated by severe instructions to defense counsel by the judge that hurried and demeaned him and abbreviated his questioning. During the cross-examination of the Government's lead witness (where critical first impressions are created) defense counsel attempted to establish that Medicaid claims were often fraudulent—obviously because Medicaid recipients were to testify against the Appellant. The court mildly rebuked defense counsel at first, indicating that such fraud was common knowledge (Tr. 43, j). However, after allowing counsel to cross-examine further he abruptly cut him off, saying, "We don't have to go any further than that. Everybody knows this takes place. Let's go on to this trial. Let's talk about this case." (Tr. 43-44, j).

Immediately thereafter counsel attempted to lay a predicate to introduce a certain letter, which caused the judge to snap, "If you have a letter mark it for identification. Offer it in evidence. I can't waste time with this

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3. Comments by the court in the presence of the jury will be denoted in transcript references by "j".

folderol that has nothing to do with the case." (emphasis added) (Tr. 45, j). Ironically the letter—the irrelevant "folderol"—and an additional document were then admitted into evidence, over the objection of the prosecutor. (Tr. 46)

During the cross-examination of a key government witness, one Comacho, Judge Brieant interrupted (Tr. 181-185) to attack the intelligence and competence of defense counsel.

> THE COURT: Why is it we are having these tremendous pauses? Why is it we are having every answer repeated? Not just the good answers. I don't mind tactics. If a lawyer wants to take a good answer and repeat it so as to make sure the witness' answer is heard by the jury, that is common-place, but you must not do it with every single answer. You are getting a tremendous time lag between answers. You are not paying attention to my directions and rulings, and you are being repetitious, and you've tried this case once so it ought to be very easy; it ought to be like rolling off a log. (Tr. 182)

He concluded his remarks by saying:

> Please let's not have this lengthy delay. If you want to show the jury that her recollection is poor, the way to confront her is to frame your questions one after another, and you sit there thinking and having —or having a private seance with yourself wasting my time on a case you tried once. You ought to be ready. It's ridiculous. (Tr. 184)

After arbitrarily limiting cross-examination of Comacho (Tr. 189) and again denigrating defense counsel's competence (Tr. 192), Judge Brieant indicated the lawyer

was insulting the jury's intelligence and wasting its time (Tr. 198, j). While cross-examining yet another government witness the judge told counsel, "Look, I'm not going to have speeches to the witness. I've told you that several times. She is not concerned with what you want, and you are not to tell her what you want. Just try the case." (Tr. 293).

The record is replete with the trial judge's ascorbic, unwarranted and contradictory remarks[4] made primarily before the jury and conveniently when the government witnesses were in trouble. Judge Brieant's treatment of the Appellant's lawyer clearly indicated that he thought the accused was guilty, judicial conduct that exceeds even the broad limits of *Quercia v. United States*, 289 U.S. 466 (1933) that has been consistently condemned in the circuit from which this conviction arises. See e.g., *United States v. Persico*, 305 F.2d 534 (2d Cir. 1962); *United States v. Brandt*, 196 F.2d 653 (2d Cir. 1952); *United States v. Woods*, 252 F.2d 334 (2d Cir. 1958); *United States v. Grunberger*, 431 F.2d 1062 (2d Cir. 1970); *United States v. Fernandez*, 480 F.2d 726, 736-738 (2d Cir. 1973); *United States v. Brandt*, 196 F.2d 653 (2d Cir. 1952); *United States v. Gugliemi*, 384 F.2d 600, 605 (2d Cir. 1967); *United States v. DeSisto*, 289 F.2d 833, 834 (2d Cir. 1961); *United States v. Nazzaro*, 472 F.2d 302, 307 (2d Cir. 1973).

Clearly Judge Brieant's conduct was inconsistent with the well settled principle that the District Judge's fundamental duty is to ensure that ". . . the entire trial will

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4. These references include, but are not limited to, Tr. 116-118; 345-6; 358-9; 362, j; 364, j; 365, j; 370-1, j; 404, j; 445, j; 448-451, j; 452, j; 455-6, j; 473, j; 494-7, j; 449, j; 559, j; 562, j; 578-9.

be conducted in a general atmosphere of impartiality." *United States v. Cassiagnol,* 420 F.2d 868, 878 (4th Cir. 1970). See also *United States v. Cole,* 491 F.2d 1276 (4th Cir. 1974); *Young v. United States,* 346 F.2d 793 (D. C. Cir. 1965); *United States v. Coke,* 339 F.2d 183, 185 (2d Cir. 1964); *United States v. Kelly,* 314 F.2d 461 (6th Cir. 1963). The conviction should be reversed.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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